IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

O.S.A.No.15 of 2003

Date of decision: **March 21, 2007.**

M/S Usha Breco Ltd. Appellant.

Versus

M/S Asia Resorts Ltd. Respondent.

The Hon'ble Mr. Justice V.K. Gupta, C.J.
The Hon'ble Mr. Justice V.K.Ahuja, J.
Whether approved for reporting[1]*?*

For the Appellant: **Mr Pradeep Bakshi, Advocate alongwith Mr.Paresh Sharma, Advocate.**

For the respondent: **Mr. R.L.Sood, Sr. Advocate with Mr. Vikas Rajput, Advocate.**

V.K. Gupta,C.J *(Oral).*

The judgment dated 12.8.2003 passed in Civil Suit No.2 of 1994 allowing a petition filed by the respondents under Section 20 of the Arbitration Act 1940, is under challenge in this appeal filed by the appellant.

The only contention urged by the learned counsel appearing for the appellant assailing the aforesaid impugned judgment is that the learned Single Judge erred in allowing the petition filed under Section 20 of the Arbitration Act, 1940 despite the fact that claims of the respondent were time barred. According to the learned counsel appearing for the appellant, if on the face of the petition or based upon the admitted facts, the claims constituting the subject matter of Section 20 petition are time barred the, Court should not

[1] Whether the reporters of Local Papers may be allowed to see the Judgment?

take recourse to Section 20 and should dismiss Section 20 petition because no useful purpose would be served by referring the matter before the arbitrator for adjudication of such claims which are time barred. No other point was urged.

The case has a slightly chequered history. The petition filed under Section 20 of the Arbitration Act earlier was allowed by a Single Bench of this Court vide its judgment dated 29.8.1997 and the Court had appointed, while allowing the said application Shri Justice V.P.Bhatnagar, a retired Judge of this Court as a Sole Arbitrator to adjudicate upon the disputes between the parties. Feeling aggrieved from this judgment, the appellant herein filed an appeal before a division Bench of this Court, being OSA No. 14 of 1997.

The Division Bench allowed the said appeal of the appellant. Against the judgment of the Division Bench allowing the appellant's appeal, the respondent approached the Supreme Court and their Lordships of the Supreme Court vide judgment dated 30.10.2001 passed in Civil Appeal No.7391 of 2001 (arising out of the SLP (Civil) No. 1721 of 2000), allowed the said appeal of the respondent and remitted to the High Court the matter for "proceeding with in accordance with the provisions of the Arbitration Act, 1940, read with relevant arbitration clause in the agreement between the parties". The operative part of the aforesaid judgment of the Supreme Court reads thus:

> "Having regard to the nature of disputes between the parties, we are of the view that the delay caused in filing the application by the Appellant was not willful and hence is liable to be condoned. However, in the facts and

circumstances of the case we are also of the view that the delay shall be liable to be condoned only upon payment of costs. Accordingly, the delay in filing the application under Section 20 of the Arbitration Act is condoned on condition that the Appellant pays a sum of Rs.20,000/- to the Respondent within a period of one month. The said sum of Rs.20,000/- shall be deposited with the Registrar General of this Court on or before 1st December, 2001 and on such deposit the Respondent would be at liberty to withdraw the same. For payment of cost as stated above, the appeal would stand allowed and the matter would be remitted to the High Court to be proceeded with in accordance with the provisions of the Arbitration Act, 1940 read with relevant arbitration clause in the agreement between the parties. In case the Appellant fails to deposit the said amount of Rs.20,000/- within the stipulated period, the appeal would be deemed to have been dismissed without further reference to the Court."

A very careful perusal of the aforesaid judgment of the Supreme Court clearly and unmistakably reveals that the Supreme Court was of a clear view that Section 20 petition filed by the respondent was time-barred. Their Lordships actually held so as is clearly evident from the following consequential observations made in the course of the judgment:

> "In the instant case, the arbitration clause states that all parties would resolve such differences by mutual consultation failing which either party must give to the other notice in writing of the existence of such question dispute or difference and the same shall be referred for the final determination. The Appellant issued notice to the Respondent and a definite reply was received by the Appellant. It is clear that cause of action for filing had arisen, the moment the Appellant received the reply notice denying the claims made by

> the Appellant. Therefore, the Division Bench has rightly held that the application was barred by time.“

After holding that Section 20 Petition filed by the respondent was time barred, their Lordships proceeded to invoke Section 5 of the Limitation Act and after making some pertinent observations with respect to the scope and applicability of Section 5 of the Limitation Act, and after agreeing with the contention raised by the appellant (in the appeal before the Supreme Court), their Lordships held that in view of the facts and circumstances of the case, there was warrant for condoning the delay in filing Section 20 petition and accordingly as noticed earlier, the delay was condoned and the matter was remitted to this Court for consideration afresh in accordance with the provisions of Section 20 of the Arbitration Act, 1940 read with the relevant arbitration clause.

A very clear reading of the aforesaid Supreme Court judgment leaves us in no manner of doubt that initially having held that Section 20 petition was barred by time, then by taking recourse to Section 5 of the Limitation Act and by condoning the delay in filing Section 20 petition, the Supreme Court had put its seal of approval as far as the invocation of Section 20 of the Arbitration Act, 1940 by the respondent is concerned. In other words, the Supreme Court by remitting the matter to this Court has clearly opined and directed that under the facts and circumstances of the case especially in the light of the delay having been condoned, this Court should proceed in allowing Section 20 petition, especially in the light of the unmistakable observation with respect to the existence of the relevant arbitration clause in the agreement

between the parties. The direction by their Lordships that the High Court shall proceed "with in accordance with the provisions of the Arbitration Act, 1940 read with relevant arbitration clause in the agreement between the parties", clearly suggests that their Lordships were of the view that the High court should dispose of Section 20 petition by taking into consideration the arbitration agreement between the parties. In other words, the High Court should proceed to appoint the Arbitrator in terms of the Arbitration agreement and refer the disputes between the parties to arbitration accordingly. The arbitration agreement between the parties reads thus:

> "If at any time any question, dispute and difference whatsoever shall arise between ARL and UBL in relation to or in connection with this Agreement, both parties agree to resolve such differences by mutual consultation failing which either party may give to the other notice in writing of the existence of such question, dispute or difference and the same shall be referred for the final determination of a single arbitrator, if agreed upon or to two arbitrators one to be appointed by ARL and another by UBL: or in case of disagreement between the said two arbitrators to the final arbitration of an Umpire to be appointed by the said two arbitrators and that the award of the sole arbitrator or the said Umpire as the case may be shall be final and binding on both the parties and the said arbitration proceedings shall be governed by the provisions of the Indian Arbitration Act, 1940 and the rules thereunder, to be read together with all statutory amendments or modifications of the said Act."

Whether the claims of the respondent are time barred or not is an issue which undoubtedly would fall within the province and domain of the Arbitrator. Because the petition filed under Section 20 of the Arbitration Act is required to be allowed in the light of the aforesaid judgment of the Supreme Court, this Court is proceeding to allow this application, but as far as the limitation aspect of the claim is concerned, neither this Court has gone into such aspect nor this Court intends to influence the Arbitrator with respect to any ingredient of such aspect. In other words, the mere fact that this Court has allowed Section 20 petition, should not at all be an influencing or a guiding factor vis-à-vis the Arbitrator in deciding the limitation aspect. The arbitrator shall decide that aspect purely on its own merit and strictly in accordance with law totally uninfluenced by the fact that this Court is allowing Section 20 petition and referring the dispute for adjudication to the learned Arbitrator.

The arbitration agreement clearly stipulates that the parties have to resolve the disputes and differences through arbitration of a Single Arbitrator, if agreed upon between the parties. The option of reference to two arbitrators is only available if the parties fail to agree upon a single Arbitrator.

In the present case, the parties not only failed to agree upon the single arbitrator, they actually failed even to come around to agree for adjudication of the disputes through the arbitration. In the course of a long drawn and protracted legal battle between the parties spanning now to almost two decades, the disagreement between the parties persists. Even today, we tried to persuade the learned counsel for the appellant to either suggest to us the name

of a proposed arbitrator or to help us in finding one. He declined to do so. Under the circumstances, therefore, we are left with no option but to invoke our discretion under Section 20 of the Arbitration Act, 1940 and proceed to appoint a sole arbitrator in terms of the arbitration agreement.

Under Section 85 of the Arbitration and Conciliation Act, 1996 even though the Arbitration Act, 1940 stands repealed, under sub-section (2) of the said Section, the provisions of 1940 Act would apply in relation to arbitral proceedings which commenced before the coming into force of 1996 Act. The expression "commencement of arbitral proceedings" is covered by Section 21 of 1996 Act which reads thus:

> "**21. Commencement of arbitral proceedings.**- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

Since undoubtedly in the present case, and the parties agree, the request for reference of disputes to arbitration was received by the appellant from the respondent before the coming into force of 1996 Act, the provisions of 1940 Act would apply to the present case.

On a totality of all the aforementioned facts and circumstances, we dismiss this appeal and by invoking Section 20 of the Arbitration Act, 1940 and based upon the covenants contained in the arbitration agreement between the parties, hereby refer the disputes to arbitration by appointing Shri Justice K.C. Sood (Retd.), a former Judge of this Court, as the sole arbitrator.

The parties are at liberty to file their claims/counter claims before the learned Arbitrator who shall enter upon the reference immediately and pass the arbitral award without any delay.

The Arbitrator's fee is fixed at Rs.1.00 lac, inclusive of secretarial and all other allowances, which shall be paid to him in equal shares by both the parties. If, however, in connection with the conduct of arbitration proceedings the Arbitrator has to travel outside Shimla, he shall be paid a daily fee of Rs.5000/- and actual traveling, lodging and boarding expenses which amount shall also be borne by the parties and paid to him in equal shares.

Appeal dismissed. No order as to costs.

CMP No.231 of 2003

In view of the dismissal of the main appeal, this application does not survive and is dismissed accordingly.

(V.K. Gupta), C.J.

21st March, 2007 **(V.K. Ahuja), J.**
(SDS)